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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 252.

HIPPOLITE FILHIOL ET AL, PLAINTIFFS IN ERROR,

v.

GEORGE H. TORNEY, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

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This is an action of ejectment, based upon the same title which has been twice presented to the court: First, in *Muse v. Arlington Hotel Company*, when the writ of error was dismissed because no jurisdiction in this court was shown by the record (168 U. S., 430); secondly, in *Filhiol v. Maurice*, when this court reversed the judgment of the circuit court which had taken jurisdiction and passed on the merits by sustaining demurrer) because the complaint did not show jurisdiction in that court (185 U. S., 108).

To the complaint in this cause a demurrer likewise was interposed, and later an amended demurrer, the latter upon

three grounds, viz: 1. Want of jurisdiction of the person; 2. Want of jurisdiction of the subject-matter; 3. Failure to state a cause of action.

Transcript of Rec., pp. 21 and 32.

This demurrer the circuit court sustained "to the jurisdiction of this court," and dismissed the complaint (*Trans.*, p. 33). An opinion by the district judge was also filed with the order, which goes entirely upon the want of jurisdiction (*Trans.*, pp. 34–36). To that judgment this writ of error was sued out.

THE COMPLAINT sets forth that Don Juan Filhiol, the ancestor of the plaintiffs—his only descendants and heirs—was born in 1740, settled in Louisiana in 1779, was appointed in 1783 by the King of Spain a captain in his army and commandant of the militia, assigned to duty at Ouachita by Don Estevan Miro, governor general from 1783 to 1789, inclusive, and that "as a reward for his civil and military services in his capacity as commandant of that then important post, and other valuable and distinguished services by him rendered to the King of Spain," the said governor general, who was fully empowered thereto, made to him on February 22, 1788, in the King's name, a grant of one square league of land at Hot Springs, now in Garland county, Arkansas, by due description therein set forth; that after the cession of Louisiana to the United States and after the extinguishment in 1818 of the Indian right of occupancy, plaintiff's ancestor leased in 1819 the granted premises to Dr. Stephen P. Wilson for a five years' term, and he entered into possession, continued some time in possession, and made some improvements. But in 1821 their ancestor, then a citizen and resident of the State of Louisiana, in which Territory he had resided for over forty years, died; that for want of the original grant, which had infact

been left in the possession of R. P. Bowie, a distinguished lawyer, without the knowledge of Filhiol's surviving heirs, they were embarrassed in the prosecution of their rights; and it was not until 1883 that the grant was found among the effects of Mr. Bowie's widow, under circumstances detailed and shown by affidavits, and restored to the heirs.

The practice of Arkansas requires a complaint in ejectment to set out the instruments of title and transfer, for which reason this complaint exhibits them *in extenso*, including a conveyance by Filhiol to his son-in-law, Bourgeat, in 1803, pursuant to the prescribed regulations for such purpose by Governor Morales, and a retrocession by Bourgeat to Filhiol in 1806.

For present needs it is unnecessary to present here further details, because upon this demurrer the validity and sufficiency of the grant are not open to question; and, indeed, upon the former arguments in the causes mentioned have been, it is believed, abundantly and convincingly shown.

The *locus in quo* now sued for is parcel of the original grant and consists of the plot of ground occupied as the site of the Army and Navy general hospital at Hot Springs.

After setting forth the title and facts above summarily stated, the complaint proceeds with the following averments now chiefly interesting:

"And for cause of action these plaintiffs say that by the third article of the treaty between the United States and the Republic of France, ratified on the 21st day of October, 1803, by which the province of Louisiana was acquired by this Government it was agreed and established that the inhabitants of said province should, among other things, 'be maintained and protected in the free enjoyment of their * * * property;' that such provision, by a just construction of said treaty, extended to the property of the said Don Juan Filhiol, the plaintiffs' ancestor, so as aforesaid granted to him, and also to the rights of these plaintiffs as his heirs in and to the same, and so far forth qualified the rights of property acquired by the United States thereunder; but that, nevertheless denying that these

plaintiffs were entitled to be maintained and protected in such enjoyment of their said property by any construction of said treaty, the United States asserted title to said land by virtue of the general cession of the province of Louisiana, without regard to such exception in the said third article contained, and, prior to the commencement of this suit, did by their officers and agents expel the plaintiffs from possession of the said land last above described, which is parcel of the aforesaid grant to their said ancestor, and did deliver over such possession to the defendant in this action sometime before the commencement thereof, to wit: on the first day of January, A. D. 1900, and did then establish him in such possession thereof wrongfully and unjustly; that since said date and for more than two years, the said defendant has so remained in possession of said land in controversy claiming the same for the United States as superintendent of the U. S. Army and Navy hospital, ousting the plaintiffs and denying their right thereto, by direction of the United States and in pursuance of the unlawful and unjust possession so given by them to him, and without any other right or claim of right thereto on the part of said defendant except as such superintendent and as a public officer of the United States. And that the cause of action of these plaintiffs against the said defendant arises out of said treaty and draws in question the construction thereof.

"And also these plaintiffs say that they were by inheritance from their said ancestor lawfully possessed of the land in controversy, as parcel of said grant to him made as aforesaid, but that the United States did heretofore deprive them of their said property without any process of law, and without any legal right so to do, and did take the same for public use without any compensation to these plaintiffs, and did as aforesaid by their officers and agents expel these plaintiffs from possession of the land in controversy, and before the commencement of this action, to wit, on the first day of January, A. D. 1900, established the defendant in possession thereof wrongfully and unjustly, and so he has since remained as aforesaid pursuant to such acquisition of possession by him, and by direction of the United States, and without any other right or claim of right thereto, and has all said time ousted these plaintiffs. And so their cause of action arises under the Constitution of the United States and involves the application thereof for the protection of their just rights."

The foregoing comprises all the facts in the record which seem material to the consideration of the questions now arising upon it; but, as seems to be permissible under the practice in Arkansas, the defendant has not only demurred, but answered as well, the answer not overruling the demurrer. That answer went up as part of the record of the cause. So being, it may, at least, be referred to in argument for the help it affords to the plaintiffs' positions.

THE JURISDICTION.

This appears to rest securely upon either of the two grounds which the complaint suggests: the meaning and force of the treaty of 1803, or the application of the Constitution.

1. The district judge, presiding in the circuit court, summarily disposed of the first of the two grounds without further consideration than to remark that "the allegations of the complaint as to the rights of plaintiffs under the treaty with France are practically the same as were those in the former cases and which the Supreme Court held were insufficient to confer jurisdiction."

It is respectfully submitted the plaintiffs are entitled to a more discriminating reading of their complaint.

In *Muse v. Arlington Hotel Company* the jurisdiction was laid upon the citizenship of the parties, and the case determined below on demurrer upon questions not involving either the treaty or the Constitution. Upon the record there the circuit court of appeals possessed the right of final judgment. So this court held, saying:

"As ruled in *Ansbro v. United States*, 159 U. S., 695, 697, 'a case may be said to involve the construction or application of the Constitution of the United States when a title, right,

privilege or immunity is claimed under that instrument, but a definite issue in respect to the possession of the right must be distinctly deducible from the record before the judgment of the court below can be revised on the ground of error in the disposal of such a claim by its decision' (*Green v. Cornell*, 163 U. S., 75, 78).

"The same rule is applicable in respect of the validity or construction of a treaty. Some right, title, privilege or immunity dependent on the treaty must be so set up or claimed as to require the circuit court to pass on the question of validity or construction in disposing of the right asserted (*Borgmeyer v. Idler*, 159 U. S., 408)."

Applying this doctrine, this court then said, with reference to the treaty basis:

"The amended complaint stated that plaintiffs would '*rely upon the following written evidences of their title* for the maintenance of this action,' and enumerated, among them, 'the 3d article of the treaty between the United States of America and the French Republic of April 30, 1803, which was ratified on the 21st of October, 1803,' * * * *but nowhere was any right, title, privilege or immunity asserted to be derived from either Constitution or treaty. There was nothing to indicate in what way, if any, the cause of action was claimed to arise from either.*"

In *Filhiol v. Maurice*, which was ejectment against the tenants of a bath-house site, the jurisdiction was attempted to be placed upon the same grounds now asserted. The circuit court assumed jurisdiction, and sustained a demurrer to the complaint upon the merits. This court entertained the writ of error, but reversed the judgment because the circuit court had no jurisdiction, saying:

"But no right, title, privilege or immunity was here asserted as derived from the Constitution or the treaty, *as against these private individuals*, who were impleaded as defendants, either specifically, *or through averments that plaintiffs were ousted in violation of the treaty and of the fifth amendment*, the provisions of which *it was the duty of the Federal Government* to observe.

"The gravamen of the complaint was that plaintiffs' ancestor had a perfect title, to which they had succeeded, and the appropriate remedy for illegal invasion of the right of possession was sought, but it was not made to appear that the circuit court had jurisdiction, for the action was not against the United States, nor could it have been, as the United States had not consented to be so sued; and so far as defendants were concerned, it was *not charged that they took possession by direction of the Government*, and plaintiffs set up no more than a wrongful ouster *by merely private persons*, remediable in the ordinary course, and in the proper tribunals."

This authoritative definition of the defects of the several complaints in the two former causes, sharply indicated by the words italicized for the purpose, enables such ready comparison with the complaint in this cause above quoted that nothing more is necessary. These decisions have cleared the path. They plainly direct how the obvious facts of the plaintiffs' case should be stated in order to invoke the power of the Federal courts to redress the denial of their rights, and they have been so pleaded accordingly.

As concerns the treaty, the complaint sets forth its engagement for maintenance and protection of the inhabitants of the ceded territory in the free enjoyment of their property, in qualification of the rights of sovereignty and proprietorship which the United States took from that instrument; avers that by just construction this guaranty extended to the rights of inheritance of these plaintiffs from their ancestor, who was such an inhabitant and who became a citizen of the United States; that the United States, denying any construction of the treaty to be sufficient to that end, asserted its title to the property in question by virtue of the general cession to it of the territory, regardless of the qualifying exception; expelled the plaintiffs from their possession, and wrongfully and unjustly put the defendant in such possession; that the defendant has for more than two years since January 1, 1900, continued as a trespasser in such possession,

ousting the plaintiffs and denying their rights by direction of the Government, and with no other right or claim of right to the property than so derived, and that the plaintiffs' cause of action arises upon the treaty and draws in question its construction.

Thus both the plaintiffs' right to the free enjoyment of their property and their immunity from the invasion of that right are deduced from the treaty and asserted to be derived from it; and it is charged that the defendant's trespass was first committed, and has been since continued, "by direction of the Government," one of the parties to the public engagement which has been so violated. These averments, admitted by the demurrer, assuredly meet all the defects in the former complaints pointed out by the court and make a case so explicit that it is difficult to conceive of a stronger assertion.

A grant is shown which, by the law and customs of Spain, was ample to vest in the grantee a title complete, perfect, and exclusive. This grant had been enjoyed without a question of its validity or its complete investiture of entire title for fifteen years under Spanish law at the time of the treaty. Was that title "property"? If so, what is the "free enjoyment" of it, in which the grantee was to be maintained and protected? What the extent to which maintenance and protection should go? Is the right of transmission to his heirs one of the features of the right of property to be maintained and protected? Is it a breach of the obligation assumed to take this property from the heirs by one contracting party and bestow the possession and use of it upon the defendant, without their consent, and without compensation? Does the contracting Government fulfil that obligation by enacting a statute requiring them to bring a suit in the Court of Claims at Washington within ninety days of its passage, without notice to them and without their actual knowledge of the requirement, and upon the

lapse of such time to seize it as forfeited to the Government on whose protection in their free enjoyment of it they had the right to rely?

Obviously these and other questions arise upon the facts stated, and necessarily involve construction. In short, since one view of the treaty's meaning will support the right of property asserted by these plaintiffs, and its immunity from invasion by the acts complained of, although the contrary might defeat them, construction is involved and the case "arises" under the treaty.

Starin v. New York, 115 U. S., 257.
R. R. Co. v. California, 118 *Id.*, 109.
Ames v. Kansas, 111 *Id.*, 449.

These cases are direct to the point; and in *United States v. Arredondo*, 6 Pet., 691, on page 712, the court, speaking of a similar article in the Florida treaty, quotes from a previous decision "that it has been very truly urged by the counsel of the defendant in error that it is the usage of all the civilized nations of the world, when territory is ceded, to stipulate for the property of its inhabitants. An article to secure this object, so deservedly held sacred in the view of policy as well as of justice and humanity, is always required and is never refused." And then proceeds:

"When such an article is contained in a treaty of cession and its meaning submitted to our consideration, we shall follow up and effectuate the intention of Congress by deeming the subject-matter to be, whether the land in controversy was *the property of the claimants* before the treaty, and, if so, that its protection is as much guaranteed by the laws of a republic as the ordinances of a monarchy."

Similar language was used in the opinion in *United States v. Chaves*, 159 U. S., 458.

It is interesting on this point to turn to the answer which the United States attorney, as the attorney for the defendant, has, by direction of the Attorney General (Trans., p. 32), interposed to meet the facts set out by plaintiffs. It "denies that the provision of the third article of the treaty * * * referred to in the said complaint, *extended to the property* of the said Don Juan Filhiol or the rights of the said plaintiffs as his heirs in and to the same, or that it qualified the rights of property acquired by the United States thereunder" (Trans., pp. 27, 28). And at a later point, "further answering, says that by the treaty of cession * * * the Republic of France, being at the date of said treaty the absolute owner of the premises *here in controversy*, conveyed the same to the United States of America, and that the latter has ever since been the sole and absolute owner in fee-simple of said property" (Trans., p. 31).

While it is not contended but that the jurisdiction must appear with entire sufficiency from the complaint alone, it affords satisfaction so to demonstrate that the allegations of it, abundantly adequate it is thought, are thus shown to state truly the crux of the contest to rest in construction of the treaty.

The case of *Florida v. Furman*, 180 U. S., 436, seems to render all discussion needless. Seemingly there is no distinction in principle between that case and the one at bar. If difference exist, it consists in the greater amplitude of the facts set forth here to support the jurisdiction of the Federal court.

And see—

Rice v. Ames, 180 U. S., 371–'4.
Terlinden v. Ames, 184 U. S., 270.
Ornelas v. Ruiz, 161 U. S., 502–'7.

2. Like argument demonstrates that the claim of the application of the Constitution supports and demands the exercise of the Federal judicial power. In fact, the prohibitions against deprivation of property without due process of law and against taking for public use without just compensation, contained in the fifth amendment, are but the converse of the treaty engagement, the constitutional forbiddance of those acts by which public authorities usually impair, when they assail at all, the free enjoyment of property.

In such a case as this the two cover the same ground, the one by affirmative engagement, the other by negative defense; the one to guaranty the right, the other to assure immunity against its invasion.

And when the facts are admitted to be that the United States deprived these plaintiffs of their property without *any* process of law and, without legal right, took it for public use without *any* compensation, and that this defendant as a trespasser upon their rights continues to hold it against them solely by such claim and for such use, it would seem too plain for words that the injury should be redressed by the tribunals to which judicial power in such causes is committed. If by refinements and subtleties such a plain guaranty can be done away with at all, it would be needless to proffer reason against them.

The court below disposed of this matter by holding that the above-mentioned averments of the complaint were only anticipatory of the defense, hence but surplusage, and therefore not to be considered; whereby "there is clearly no Federal question involved and the court is without jurisdiction."

It is hard to see why such reasoning would not always deny the service of the Federal tribunals to a suitor so injured. In *Muse v. Arlington Hotel Company* this court said, and repeated in *Filhiol v. Maurice*: "And it is settled that in order to give the circuit court jurisdiction of a case so arising, that it does so arise must appear from the plaintiff's

own statement of his claim;" and referred to *Colorado Central Mining Co. v. Turck*, 150 U. S., 138; *Press Publishing Co. v. Monroe*, 164 U. S., 105, among many such decisions. The district judge cited also cases in which it was held that the want of such jurisdictional averments could not be supplied by the defendant's pleading, and might have added others. Such averments cannot be both necessary and surplusage. Those in the complaint at bar are not justly to be characterized as anticipatory of a defense. They are jurisdictionally descriptive of the injury which the action seeks redress of. They simply show the governmental action, which violated the Constitution, not a private injury, which would not so operate, according to the rule laid down in *Filhiol v. Maurice*.

It is enough that the demurrer confesses their truth; but by judicial notice of public action the court is also acquainted with their truth.

3. It is suggested that the action cannot be maintained against the defendant, because in effect against the United States, which have not consented to be so sued. This point must be deemed at rest by the many well-considered decisions of this court which have distinguished the two classes of actions, in one of which the United States, or a State, is to be regarded as defendant, in the other not so. The defendant here is answerable as a trespasser; his own claim to hold the property from the plaintiffs is only involved. The United States is in no sense the party, and its rights are not to be adjudicated, except in so far only as the defendant relies upon its authority, or want of authority, to justify his own. The action is to recover possession of land, to which it is essential the plaintiffs shall show title and right of possession. If the defendant can show title in the United States he will prevail. But he cannot defeat the plaintiffs' just rights as against himself by merely showing that he

takes all his claims from the United States when it also appears that he thereby acquired no legal right to the possession.

But discussion is unnecessary; even unwarranted at the bar. It has been exhausted and authority overrides it. In *Tyndal v. Wesley*, 167 U. S., 204, the reasons for sustaining such an action, and the approval of them by repeated adjudications in this court, are so fully shown by Mr. Justice HARLAN that the subject must be left with but a citation of the cases for convenience—

United States v. Lee, 106 U. S., 196.
Pennoyer v. McConnaughy, 140 *Id.*, 1, 10.
In re Tyler, 149 *Id.*, 164, 190.
Scott v. Donald, 165 *Id.*, 58, 68.
United States v. Peters, 5 Cranch, 115, 139.
Meigs v. McClung's Lessee, 9 *Id.*, 11.
Osburn v. Bank of United States, 9 Wheat., 738.
Davis v. Gray, 16 Wall., 203.
Smyth v. Ames, 169 U. S., 466.
Scranton v. Wheeler, 179 *Id.*, 141, 152.
Prout v. Starr, 188 *Id.*, 537, 542–'3.
McGahey v. Virginia, 135 *Id.*, 662.
Poindexter v. Greenhow, 114 *Id.*, 270, 285, *et seq.*
Board of Liquidation v. McComb, 92 *Id.*, 531.
Reagan v. Farmers' L. & T. Co., 154 *Id.*, 362, 388, *et seq.*

And see also—

Wilcox v. Jackson, 13 Pet., 498.
Governor of Georgia v. Madrazos, 1 *Id.*, 110.
Grisar v. McDowell, 6 Wall., 363.
Brown v. Huger, 21 How., 305.
The Siren, 7 Wall, 152.
The Davis, 10 *Id.*, 15.
Shelton v. Platt, 139 *Id.*, 591.
Allen v. B. & O. Rr. Co., 114 *Id.*, 311.
Litchfield v. Webster County, 101 *Id.*, 773.
Stanley v. Schwalby, 147 *Id.*, 508; *S. C.*, 162 *Id.*, 255.

The cases in which actions against officers have been held to be in fact against the Government or a State aid to make clearer the line of demarkation between the two classes and to show the place of this cause to be within the other class.

Fitts v. McGhee, 172 U. S., 5, 9.
Harkrader v. Wadley, ibid., 148, 169.
Smith v. Reeves, 178 *Id.*, 436.
In re Ayres, 123 *Id.*, 443.
North Carolina v. Temple, 134 *Id.*, 22.
Cunningham v. Rr. Co., 109 *Id.*, 446.
Hagood v. Southern, 117 *Id.*, 52.
Belknap v. Schild, 161 *Id.*, 10.

It is inconsistent with governmental dignity or justice that inquiry should be refused into the question of title, which any officers with purpose or without authority have seized; and what even monarchies never deny in such cases, it would be a peculiar reproach to a republic to strangle.

Inasmuch as the opinion below is not only limited to the question of jurisdiction, but the judgment by its terms goes entirely upon the want of it, so that the record leaves no opportunity to imply any determination on the merits to the court below, it is supposed no argument will be allowed upon that branch of the case; but, if so, counsel will be ready to submit it at the bar.

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